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MICHAEL BEST & FRIEDRICH LLP
100 E WISCONSIN AVE
MILWAUKEE WI 53202

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OFFICE OF PETITIONS

In re Application of :
Johnson, et al. :
Application No. 10/720,027 : DECISION ON PETITION
Filed: November 20, 2003 :
Attorney Docket No. 066-42-9536-01 :

This is a decision on the "PETITION TO ACCORD FILING DATE PURSUANT TO 37 C.F.R. §§ 1.53 AND 1.182", filed March 14, 2005, requesting that the above-identified application be accorded a filing date of November 20, 2003, and not the presently accorded date of August 30, 2004.

The petition is **GRANTED**.

The application was filed on November 20, 2003. However, on February 26, 2004, the Office mailed a "Notice to File Missing Parts of Nonprovisional Application", stating that the application had been accorded a filing date of November 30, 2003; however, Figures 41 and 42 of the drawings as described in the specification appeared to have been omitted. In addition, the statutory basic filing fee and oath or declaration were missing. With respect to the drawings, applicants were instructed that they could: (1) file a petition (together with a \$130 petition fee) alleging that the drawings were in fact present; (2) supply the omitted drawing figures, pay a \$130 petition fee, and request the date of the submission as the new filing date; or (3) take no action, which would be treated as constructive acceptance by applicants of the application as filed. While the Notice to File Missing Parts set an extendable period for reply of two (2) months with respect to the submission of the statutory basic filing fee and the oath or declaration, with respect to the omitted drawings the two (2) month period for reply was not extendable.

In response, applicants took no action with respect to the omitted drawing figures within the two (2) month period for reply, thereby constructively accepting the application as filed. With respect to the statutory basic filing fee and the oath or declaration, applicants filed these items in response to the Notice on August 30, 2004, made timely by purchasing a four (4) month extension of time and including a Certificate of Mailing dated August 25, 2004. In addition, on that same date, applicants filed a copy of Figures 41 and 42 together with a Preliminary Amendment, seeking to amend the application to include these figures based upon an incorporation by reference statement to a prior filed provisional application (60/523,716).

In response, the Office accorded the application a filing date of August 30, 2004. Applicants filed a Request for Correct Filing Receipt on October 18, 2004, which was dismissed in a communication mailed on October 25, 2004. In turn, applicants have filed the instant petition.

It is obvious that the Office erred in according the application a filing date of August 30, 2004. The application met the requirements for a filing date on November 20, 2003.

Moreover, MPEP § 201.06(c) states that:

. . . an applicant may incorporate by reference the prior application by including, in the application-as-filed, a statement that such specifically enumerated prior application or applications are "hereby incorporated herein by reference." The statement may appear in the specification or in the application transmittal letter. The inclusion of this incorporation by reference of the prior application(s) will permit an applicant to amend the continuing application to include any subject matter in such prior application(s), without the need for a petition.

Obviously, in view of the incorporation by reference statement to prior filed provisional application, the drawings of Figures 41 and 42 are not new matter if they were a part of the disclosure of that application. That issue will be determined by the Examiner in due course.

Given the basis for granting this petition, no fee was required.

The file is being returned to OIPE for processing with a filing date of November 20, 2003, not August 30, 2004, using the application papers filed on November 20, 2004, and for indication in Office records that seventy-two (72) sheets of drawings were present on filing.

Telephone inquiries specific to this matter should be directed to the undersigned at 571-272-3207.



Cliff Congo
Petitions Attorney
Office of Petitions